71-1491

MAY 15 1972

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

TWO TRACTS OF LAND, JOHN D. EGERTON, Et Al.,
10.1 ACRES OF LAND, MARY B. DAVIS, ET AL.,
36 ACRES OF LAND, JAMES B. ROWLAND, Et Ux.,
FOUR TRACTS OF LAND, HOMER RAY, Et Al., - - - - - Petitioners,

versus

UNITED STATES OF AMERICA, Upon the Relations and for the Use of the Tennessee Valley Authority, - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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36 ACRES OF LAND, JAMES B. ROWLAND, ET UX.,
FOUR TRACTS OF LAND, HOMER RAY, ET AL., - - - - - - - *Petitioners*

v.

UNITED STATES OF AMERICA UPON THE RELATION AND USE OF THE TENNESSEE VALLEY AUTHORITY, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners herein, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above entitled consolidated cases (its case numbers 71-1410, 71-1419, 71-1462, and 71-1463) on February 23, 1972.

Opinions Below

The opinion of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, *infra,* pages 21-27. The judgments of the Circuit Court of Appeals in each of the four cases are printed in the Appendix hereto, *infra,* pages 29-34. The Opinion of the United States District Court for the Western District of Kentucky in the Davis case (No. 71-1462 in the Court of Appeals) is printed in the Appendix hereto, *infra,* pages 34-37. The judgment of the United States District Court for the Western District of Kentucky in the Egerton case (No. 71-1419 in the Court of Appeals) is printed in the Appendix hereto, *infra,* pages 37-42.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered February 23, 1972. The jurisdiction of the court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether TVA has statutory authority to condemn real estate for the "Land Between the Lakes" project in Kentucky and Tennessee, and whether this project is for a public purpose authorized by statute.

2. Whether arbitrary and capricious action by a federal agency in condemning property is subject to judicial review.

3. Whether an appellate court may look to testimony before a congressional committee for substantive evidence of a fact in dispute when the district court has refused to hear evidence on the question and the opposing party has thereby been denied the right both of cross-examination and of presenting direct evidence.

Constitutional Provisions and Statutes Involved

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

16 U.S.C. Sec. 831c:

> Except as otherwise specifically provided in this chapter, the Corporation—
>
> * * * * *
>
> (h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this chapter.
>
> (i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event

that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this chapter, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings: PROVIDED, that nothing contained herein or elsewhere in this chapter shall be construed to deprive the Corporation of the rights conferred by sections 258a-258e of Title 40.

* * * * *

16 U.S.C. Sec. 831u:

Surveys: cooperation with States and other agencies

To aid further the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this chapter, and to provide for the general welfare of the citizens of said areas, the President is authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expenditure of public funds,

or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative of other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end.

16 U.S.C. Sec. 813x:

Condemnation Proceedings: institution by corporation; venue

The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights-of-way which in the opinion of the Corporation, are necessary to carry out the provisions of this chapter. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right-of-way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Statement

Each of the petitioners was a land owner in the geographical area between Kentucky Lake and Barkley Lake in the States of Kentucky and Tennessee, whose property the respondent took in condemnation proceedings in the United States District Court for the Western District of Kentucky at Paducah for the purpose of creating a project known as the Land Between The Lakes Project to be used as a national recreation area.

The District Court's jurisdiction rests upon the respondent's authority to condemn, which is found in 16 U.S.C. Secs. 831c(h), 831c(i) and 831x.

The respondent contended that the authority to undertake this project exists under the Tennessee Valley Authority Act, as amended, and is to be specifically found in 16 U.S.C. Sec. 831u, which authorizes TVA "to make . . . demonstrations . . .", in a Presidential Press Release announcing the project, and in various appropriation acts granting the money to carry it out.

The petitioners raised legal objections to the taking, contending, among other things, that respondent had no authority to undertake the project and therefore no authority to take their property; and, further, if authority existed, it was being exercised in an arbitrary and capricious manner in these cases. When the District Court overruled petitioners' objections and denied its motion for an injunction, they sought an interlocutory appeal to the Circuit Court of Appeals for the Sixth Circuit under 28 USC Sec. 1292(b) be-

cause the area involved was so immense, including hundreds of thousands of acres, and the respondent intended to acquire, either by purchase or condemnation, all of the land within the area, the question of whether TVA could undertake this project should therefore, in the interest of time, money and protection of the property rights of hundreds of people, be decided before the property was actually taken and millions of dollars were spent.

This motion was overruled and respondent procedeed to take these petitioners' property in condemnation proceedings in the District Court, after which appeals were taken to the Circuit Court of Appeals for the Sixth Circuit from the final judgment in each case in the District Court.

The Circuit Court of Appeals held in its decision rendered February 23, 1972, that the project was legally authorized and that *the question of whether the action of the respondent was arbitrary and capricious was not subject to judicial review.*

TVA now has title to all of the land within the area.

Reasons For Granting the Writ

I. The TVA Act (16 USC, Sec. 813u) authorizes the President.

> ". . . to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be

> equitably and economically advanced through the expenditure of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said area; and the President is further authorized in making said *surveys and plans* to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or *demonstrations* as may be necessary and suitable to that end". (Emphasis supplied)

Clearly this language links any "demonstrations" to making surveys and plans for cooperation with affected States and their subdivisions. Moreover, if this word, in the context in which it is used, authorized TVA to construct a recreation project, there was no point, or even need, in giving specific authority for all of the other particular projects such as dams, reservoirs, power plants, transmission lines and the like.

In the circumstances the maxim *"expressio unius est exclusio alterius"* in applicable. As stated in 50 American Jurisprudence, Statutes, Secs. 243 and 244:

> "The courts may not by implication read into a statute that which is not intended to be there, or make an implication which the language of the statute does not warrant. A fortiori, there is no room for an implication when the plain provisions of the statute are to the contrary. In this respect, the courts often refer to the maxim *"expressum facit cessare tacitum."* It has even been declared that words may not be implied in a statute where

there is no necessity for such implication, and that to warrant an addition to the terms of the statute by way of implication, the presumption of intention to make the statute operate as it does with the added terms must be so strong that the contrary thereof cannot reasonably be supposed. In any event, courts should exercise great wariness in the construction of statutes where their meaning is sought to be derived, not from specific language but out of the innuendos of disjointed portions of the statute.

"As exceptions in a statute strengthen the force of the law in cases not excepted so enumerations weaken it in cases not enumerated. Indeed, it is a general principle of interpretation that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius.* The rule applies even though there are no negative words excluding the things not mentioned. Thus, a statute that directs a thing to be done in a particular manner, or by certain persons or entities, ordinarily implies that it shall not be done in any other manner, or by other persons or entities. Similarly, the enumeration of certain purposes for which the acquisition of certain property is authorized has been regarded as exclusive of all other purposes. It has also been held that the fact that a statute giving a right of action explicitly provides that certain matter shall constitute defenses is indicative of a legislative intent to exclude other defenses."

Nor, it is submitted, is it an answer that some appropriation committee members either apparently

thought there was statutory authorization or else considered the project desirable enough that specific statutory authority could be overlooked. Some members of Congress did indeed question TVA authority. Senator Ellender in the Senate hearing for the 1965 budget on page 17929 of the record stated:

> "I have seen no suggestion anywhere that the TVA knows more about park management than does the Park Service, and can 'demonstrate' to the Park Service how to run a park. The park is not a demonstration necessary and suitable to any plans TVA is making, but is the end product of plans completed by TVA in 1961".

In any event, in looking to the legislative history and Congressional hearings to determine what a statute means, it is the legislative history at the time of enactment, when those members of Congress who enacted the law were present and speaking, that must be looked to, not hearings thirty-odd years later; and it is inconceivable that Senator Norris and his colleagues could have intended a project like this as a demonstration with the power of eminent domain when the Act itself (16 USC, Sec. 831c(i)) specified the purposes for which the power may be used.

Not having specific statutory authority to get into the park, wildlife and recreation business, TVA says it is going to have a demonstration project. It is obvious that this is not in fact any sort of demonstration and that, even if it were, it is not a demonstration as is authorized by 16 USC Sec. 813u.

This is not a situation in which the property was taken as a necessary or beneficial expedient to the authorized purpose as in *United States* v. *Welch,* 327 U. S. 545, 90 L. Ed. 843 (1946); here, the so-called demonstration *is* the purpose.

II. This Court had occasion to consider the question of TVA's statutory authority to condemn in *United States* v. *Welch,* 327 U. S. 545, 90 L. Ed. 843 (1946).

In that case the District Court had held that TVA did not have the authority to condemn the particular six tracts in question, believing that it could condemn only those lands which were necessary for the dam and reservoir proper. The Circuit Court of Appeals affirmed on the ground that the particular purpose in question was a private rather than a public purpose or, at best, if a public purpose it was not authorized by the statute. This Court, in an opinion delivered by Mr. Justice Black, held that the particular purpose was authorized by the TVA Act, stating (327 U. S. at page 553) that:

> ". . . that Act does far more than authorize the TVA to build isolated dams. The broad responsibilities placed on the authority relate to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley. The TVA was empowered to make contracts, purchase and sell property deemed necessary or convenient in the transaction of its business, and to build dams, reservoirs, transmission lines, power houses, and other structures.

> . . . All of the authority's actions in these respects were to be directed towards 'development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic and social development of said areas.' . . ."

Mr. Justice Reed agreed that TVA had the authority to condemn the land in that instance but, fearful the certain language of the Court's opinion might imply that there was no judicial review of the authority's determination that a particular acquisition was within the purposes of the Act, stated in concurring opinion (327 U. S. at page 556-557):

> ". . . It is my opinion that the TVA is a creature of its statute and bound by the terms of that statute, and that its every act may be tested judicially, by any party with standing to do so, to determine whether it moves within the authority granted to it by Congress. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 47 L. Ed. 90, 23 S. Ct. 33; *Social Security Bd.* v. *Nierotko,* No. 318, October Term 1945, decided February 25, 1946 (326 U. S. 358, 369, ante, 131, 139, 66 S. Ct. 637, ALR 1445).
>
> "This taking is for a public purpose but whether it is or is not is a judicial question. Of course, the legislative or administrative determination has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted

> if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizen. The former cases go no further than this. . . ."

Mr. Justice Frankfurter also wrote a very short concurring opinion in which he stated that he did not read the Court's opinion as Mr. Justice Reed did. He stated (327 U. S. at page 557):

> ". . . This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial consideration, ultimately by this Court. It is equally true that in the numerous cases in which the issue was adjudicated, this Court never found that the legislative determination that the use was 'public' exceeded Constitutional bounds. But the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting. All the cases cited in the Court's opinion sustaining a taking recognize and accept the power of judicial review. I assume that in citing these cases the Court again recognizes the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence."

There is nothing in the opinion of the Court to indicate that Mr. Justice Frankurter's views in this regard were not shared by the balance of the Court.

Approximately seven months later, in December, 1946, this Court, in *U. S.* v. *Carmack*, 329 U. S. 230, 91

L. Ed. 209, again considered the question of the authority of a government agency to condemn under particular federal condemnation statutes in the light of the facts of that particular case.

In *Carmack,* the District Court, at the direction of the Circuit Court of Appeals, had heard evidence "as to whether or not the officials of the United States acted capriciously and arbitrarily in selecting this site". 329 U. S. at page 234, 91 L. Ed. at page 213. Finding it unnecessary to consider the question of arbitrary and capricious actions by the officials because the Court believed that statutory authority was lacking, the Circuit Court of Appeals affirmed. This Court granted certiorari because of "the importance of the construction of the statutes authorizing the condemnation of land for federal uses" 329 U. S. at page 235, 91 L. Ed. at page 213.

Holding that the question of necessity was an administrative one and would not be disturbed by the Court in the absence or arbitrary or capricious action on the part of the agency, the Court then proceeded to review the authority of the Federal Works Administrator at that time to condemn in that particular case. The Court held that the Federal Works Administrator did have the authority to condemn the property in question for construction of a post office. It stated (327 U. S. at page 239):

> ". . . While the federal power of eminent domain is limited to taking property for federal public uses, the question of the existence of a federal

> public use presents no difficulty here because the constitutional power of Congress to establish post offices is express."

These two cases are clear authority for the proposition that the Courts have authority to judicially review the facts in a particular case to determine whether the administrative agency is acting within the scope of its statutory authority.

The *Carmack* case also clearly recognizes the right to judicial review of a condemning agency's actions which are asserted to be arbitrary, capricious and in bad faith. In that case the Supreme Court stated (327 U. S. at page 243):

> "In this case, it is unnecessary to determine whether or not the selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so capriciously and arbitrarily that their action was without adequate determining principle or was unreasoned. The record presents no such issue here . . ."

Even though the Court said no such issue was presented, it went into great detail in reviewing the agency's actions, and reasons therefor, and in finding that in fact they were not arbitrary and capricious. The *Carmack* case clearly recognizes that actions of a government agency in condemning land which are arbitrary, capricious and in bad faith are reviewable by the Courts and that, while the question of necessity and amount of property to be taken is in the first instance

strictly an administrative one, if such selection can be shown to be made from improper motives and through arbitrariness and capriciousness, then the matter is certainly reviewable by the Court.

These petitioners contended that TVA was acting arbitrarily, capriciously and in bad faith in taking their property and offered to show that the reason their property was being condemned was for its resale value, TVA's intention being to resell these properties to private interests and realize a profit from the transaction.

This Court obviously recognized in *Brown* v. *U .S.,* 263 U. S. 87, 68 L. Ed. 171, a case cited with approval in *Welch,* supra, that the power of eminent domain "does not extend to the taking of one man's property to sell it to another." 263 U. S. at page 81, 68 L. Ed. at page 180. Recognizing a distinction between the situation it had before it in *Brown* and the profit making one such as is claimed here, it was stated, at page 172:

> "Our conclusion is not in conflict with that class of cases with which the justices of the supreme judicial court of Massachusetts dealt in Opinion of Justices, 204 Mass. 607, 27 L.R.A. (N.S.) 483, 91 N. E. 405. It was there proposed that the city of Boston, in building a street through a crowded part of the city, should be given power to condemn lots abutting on both sides of the proposed street with a view to sale of them, after the improvement was made, for the promotion of the erection of warehouses, mercantile establishments, and other buildings suited to the demands of trade and commerce. The justices were of the opinion that

> neither the development of the private commerce of the city nor the incidental profit which might inure to the (84) city out of such a procedure could constitute a public use authorizing condemnation. The distinction between that case and this is, that here we find that the removal of the town is a necessary step in the public improvement itself, and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation."

Nothing in *Berman* v. *Parker,* 348 U. S. 26, 99 L. Ed. 27 (1954), abrogates or weakens the rule that the power of eminent domain does not extend to the taking of one man's property to sell it to another. As in *Brown, Berman* is distinguished in that the resale of property to private interests was incidental to the public use or benefit.

III. These petitioners asserted below, and have been denied the opportunity to produce evidence to show, that their situation falls within the constitutional prohibition and is not a part of, or incidental to, the public use. The District Court would not hear evidence on the issue and the Circuit Court of Appeals resorted to testimony before an appropriation committee to refute the contention, the opinon of the Court stating:

> "The landowners assert that the TVA is condemning their property for the purpose of reselling it for commercial purposes. This is contradicted by the testimony of Chairman Wagner of the TVA Board at the hearings on H. R. 11579 before the

Subcommittee of the Senate Committee on Appropriations, 88th Cong. 2d Sess. . . ." (Appendix, pp. 26-27)

Thus these petitioners were not only denied the opportunity to offer direct evidence in support of their contention but were denied the right to refute, either by cross examination or rebuttal, the "evidence" to which the Circuit Court of Appeals looked to deny their claim.

It seems elementary that due process would prohibit a trial court from making such a crucial and conclusive finding of fact without hearing any evidence. The appellate court's function being to review the proceedings in the lower court, *a fortiori* it may make no such finding.

IV. The importance of these questions and the necessity of the Supreme Court's deciding them may perhaps be found in the observation of Mr. Justice Frankfurter in his concurring opinion in *Welch* that this court had never overturned condemnation proceedings because of lack of authority (327 U. S. p. 557). It is incomprehensible and, in the nature of things, impossible that administrative officials can never make a mistake in the field of eminent domain either in determining that authority exists for the particular project or that the authority has not been abused in a particular instance. Yet if the courts will not, under any circumstances, review these decisions of administrative officials to take a citizen's property against his will, then anything can be done for any purpose.

This, the Fifth Amendment to the United States Constitution did not foresee and does not allow.

The questions presented by this case are therefore of great significance to property owners and of great importance regarding the extent to which their property rights will be protected by the courts against overzealous or misguided government officials.

As Mr. Justice Douglas said in the May 1969, issue of True Magazine, at page 43:

> "But the TVA also became manned by political hacks and its engineering staff, while competent, developed a compulson for make-work projects for the purpose of self-perpetuation. The TVA engineering staff apparently feels it must build dams *whether they are needed or not".*

Possibly realizing that they are beginning to run out of dams to build, they have now ventured into the recreation, entertainment, and real estate business. Their authority for this, they say, is that it is a demonstration. Could they conduct a demonstration in space next?

It is submitted that the question of whether TVA has statutory authority to undertake this project, involving, as it does, hundreds of thousands of acres of land belonging to hundreds of people, many of whom did not want to have their property taken from them, is of itself an important question of federal law which has not been, but should be, settled by this court; and, further, that the District Court's and the Circuit Court of Appeals' refusal to consider actions of an adminis-

trative agency in a condemnation proceeding which are alleged to be arbitrary and capricious is in conflict with previous decisions of this Court.

CONCLUSION

Petitioners do not question TVA's authority to conduct demonstrations, but they do question whether the Land Between The Lakes project is truly a demonstration. They do not question the wisdom or necessity of the LBL project as such, but they do question TVA's development of it, the manner in which they have proceeded, and the seizure of private property for it. They do not question TVA's right to condemn land, but they do question the agency's condemnation of land for unauthorized purposes without judicial review and they contend that TVA's condemnation procedures have been arbitrary, capricious and in bad faith, and that the agency's ultimate intention is to resell the land for commercial purposes. And, finally, they contend the Circuit Court of Appeals had no right to resort to contrary testimony before a Senate Committee as proof that such was not the case.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 71-1419
No. 71-1462
No. 71-1410
No. 71-1463

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY,
Plaintiff-Appellee,

v.

TWO TRACTS OF LAND, JOHN D. EGERTON, ET AL.,
10.1 ACRES OF LAND, MARY B. DAVIS, ET AL.,
36 ACRES OF LAND, JAMES B. ROWLAND, ET UX,
FOUR TRACTS OF LAND, HOMER RAY, ET AL.,
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed February 23, 1972

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and ROTH, District Judge.*

PHILLIPS, Chief Judge. These consolidated appeals present the question of the right of the Tennessee Valley Authority to acquire land by eminent domain for the Land Between the Lakes Project in Kentucky and Tennessee. The amount of compensation for the taking of the prop-

*Honorable Stephen J. Roth, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

erties was stipulated. The only question in the District Court and on this appeal is the right of the TVA to take.

The landowners contend that there is no public necessity or reason for taking their lands; that there is no constitutional or statutory authority for the taking; that the TVA is acting arbitrarily, capriciously and in bad faith; that the land sought to be condemned is in excess of the requirements for the project; that the intended use of the land is "extravagant" and "abusive;" and that the purposes, appropriation and use of the land is violative of the Constitution and laws of the United States.

In *Davis,* No. 71-1462, District Judge Henry L. Brooks (later a judge of this court) rendered an opinion on October 17, 1968, upholding the right of the TVA to condemn property for the Land Between the Lakes Project.[1] District Judge Rhodes Bratcher made a ruling to the same effect in each of the remaining cases and, on April 12, 1971, entered final judgment against the landowners vesting fee simple title to all of the tracts in the United States.

The Land Between the Lakes Project is a "demonstration in resources development" involving 170,000 acres between Kentucky and Barkley Lakes in Western Kentucky and Northwestern Tennessee.

The presidential press release of June 14, 1963, announcing the project, described it as follows:

> "The President today announced that the Tennessee Valley Authority will develop a National Recreation Area as a demonstration in resource development in the 170,000 acre Between-the-Lakes area which lies between TVA's Kentucky Reservoir on the Tennessee

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[1]In a case arising in the Middle District of Tennessee, *United States ex rel. TVA* v. *Wofford,* No. 5084, District Judge William E. Miller (now a judge of this court) entered an order overruling motions by the landowner to dismiss, rejecting the same contentions by landowners dealt with in the opinion of Judge Brooks.

River and the Army Corps of Engineers' Barkley Reservoir just across the divide on the Cumberland River. Two-thirds of the area involved lies in western Kentucky, the remainder in Tennessee.

"For a distance of some 40 miles above each dam the shorelines of the two lakes lie only six to twelve miles apart. They enclose a narrow strip of wooded ridges rising up to 300 feet above the broad stretches of reservoir on either side.

"The President noted that the Between-the-Lakes area is within 200 miles of nearly 10 million people living in the midwest and thus the development of a national recreation area in that location meets the recommendation made by the Outdoor Recreation Resources Review Commission, and endorsed by the President in his Special Message to Congress last year, that recreation facilities for our more densely populated areas merit high priority.

"Nearly half the land under consideration for the recreation area already is in Federal ownership, under control of the Department of the Interior, TVA and the Corps of Engineers.

"The decision to proceed with the Between-the-Lakes project followed notification by Secretary of the Interior Stewart L. Udall that the Department of the Interior would enter into an agreement with TVA whereby lands administered by the Department would be turned over to TVA for the project. Other Federal lands will likewise be transferred.

"Deveopment of the project will demonstrate how an area with limited timber, agricultural, and industrial resources can be converted into a recreation asset that will stimulate economic growth of the region. It

will also help establish and define guidelines for the acquisition, development, and operation of other outdoor recreation areas.

"The area will include provision for development of new waterfowl wintering grounds in cooperation with the Bureau of Sport Fisheries and Wildlife and for management of upland game, including improvement of public hunting.

"TVA expects to start on the project at an early date. The agency will administer the area for the period required to complete the demonstration, estimated at about 10 years. At the end of that period, arrangements for permanent administraton of the area for outdoor recreaton will be determined."

We agree with the District Court that statutory authority for the Land-Between-the-Lakes Project is conferred by 16 U.S.C. § 831u (1964), which provides as follows:

"**§ 831u. Surveys; cooperation with States or other agencies**

"To aid further the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this chapter, and to provide for the general welfare of the citizens of said areas, the President is authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be

> equitably and economically advanced through the expenditure of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end."

Congress voted funds for the Lands-Between-the-Lakes Project in 1963 and for each subsequent fiscal year. A reference to congressional action funding the project from 1963 through 1971 is attached as an appendix to this opinion.

Moreover the legislative history discloses that objections on the basis of alleged lack of statutory authority have been made to Congressional appropriations committees on several occasions by owners of land within the project area. *See, e.g.,* Hearings on H.R. 9220 Before the Subcommittee of the Senate Committee on Appropriations, 89th Cong., 1st Sess. pt. 4 at 263 (1965). These repeated congressional appropriations, in the face of objections similar to those urged by the landowners in the present case, support the construction of 16 U.S.C. § 831u adopted by the District Court. As said by this court, speaking through Judge McAllister, in *T.V.A.* v. *Kinzer,* 142 F. 2d 833, 837 (6th Cir.):

> "Moreover, Congress, by regularly appropriating funds to enable the Authority to make its contributions to the System, has demonstrated its intention that the the statutory mandate is to be construed and under-

> stood in accordance with the settled construction placed upon it by the Authority, as disclosed by the Rules and Regulations setting up the Retirement System. The voting of such appropriations, in the face of the construction placed upon the Act by the Authority, has an effect similar to that resulting from the re-enactment of a statute, the provisions of which had, theretofore, been interpreted by regulations; they are deemed to have received legislative ratification and, thereby, to have become embedded in the law; and are to be given the same force and effect as the statute itself."

Since the Land Between the Lakes project is authorized by 16 U.S.C. § 831u, it follows that condemnation of lands for this project is authorized by 16 U.S.C. §§ 831c(h), 831c (i) and 831x, which confer on the TVA authority to condemn all properties which the TVA Board deems necessary to carry out the purposes and provisions of the Act. *See United States ex rel. TVA* v. *Welch,* 327 U. S. 546, 554; *Illinois Cent. R.R.* v. *TVA,* 445 F. 2d 308, 311-12 (6th Cir.).

The contention of the landowners that the acquisition of their land is unnecessary is answered by the well-settled rule that the necessity, expediency, location and extent of taking property by eminent domain are legislative and administrative questions that ordinarily are not subject to judicial review. *Berman* v. *Parker,* 348 U. S. 26, 35-36; *Joslin Mfg. Co.* v. *Providence,* 262 U. S. 668, 678-79; *Illinois Cent. R.R.* v. *TVA, supra,* 445 F. 2d at 313.

The landowners assert that the TVA is condemning their property for the purpose of reselling it for commercial purposes. This is contradicted by the testimony of Chairman Wagner of the TVA Board at the hearings on H.R. 11579 before the Subcommittee of the Senate Committee on Ap-

propriations, 88th Cong. 2d Sess.[2] Chairman Wagner testified to the Senate Committee as follows:

> "There never has been any attempt on our part to do anything but make it very clear that the entire area in this peninsula generally north of Highway 79 would be purchased. Now, that was in the report that went to the President in 1961 and it has been a part of our plans ever since then." Hearings transcript p. 29.

In response to a question, Chairman Wagner denied emphatically that the TVA would ever sell any of the condemned land for commercial purposes. He said:

> "We have made it clear from the beginning that we thought that this area, to fulfill the purpose which we believe it can serve to the benefit of the people of this Nation, . . . must be completely in public ownership. . . ."

All contentions made by appellants have been considered and are found to be without merit.

Affirmed.

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[2]Chairman Wagner presented to Committee a map outlining the 170,000 acres to be included in the project. This map is a part of the record on the present appeal. There is no dispute that all the land involved on this appeal is within the area shown on this map.

APPENDIX

Fiscal 1964—H.R. Rep. No. 902, 88th Cong., 1st Sess. 19, 58 (1963), H.R. Rep. No. 1,027, 88th Cong., 1st Sess. 25 (1963), 77 Stat. 844, 854 (1963).

Fiscal 1965—H.R. Rep. No. 1479, 88th Cong., 2d Sess. 52 (1964), S. Rep. No. 1326, 88th Cong., 2d Sess. 42 (1964), 78 Stat. 682, 693 (1964).

Fiscal 1966—Hearings on H.R. 9220, 89th Con., 1st Sess. 68 (1965), H.R. Rep. No. 527, 89th Cong., 1st Sess. 60-61 (1965), S. Rep. No. 632, 89th Cong., 1st Sess. 47 (1965), 79 Stat. 1096, 1107-08 (1965).

Fiscal 1967—H.R. Rep. No. 2044, 89th Cong., 2d Sess. 83-84 (1966), H.R. Rep. No. 2216, 89th Cong., 2d Sess. 39 (1966), 80 Stat. 1002, 1014 (1966).

Fiscal 1968—H.R. Rep. No. 505, 90th Cong., 1st Sess. 92 (1967), S. Rep. No. 574, 90th Cong., 1st Sess. 47-48 (1967), H.R. Rep. No. 820, 90th Cong., 1st Sess. 36 (1967), 81 Stat. 471, 482 (1967).

Fiscal 1969—H.R. Rep. No. 1549, 90th Cong., 2d Sess. 77 (1968), 82 Stat. 705, 715 (1968).

Fiscal 1970—H.R. Rep. No. 91-548, 1st Sess. 88-90 (1969), S. Rep. No. 91-528, 1st Sess. 54-55 (1969), H.R. Rep. No. 91-697, 1st Sess. 17 (1969), 83 Stat. 323, 336 (1969).

Fiscal 1971—H.R. Rep. No. 91-1219, 2d Sess. 94 (1970), S. Rep. No. 91-1118, 2d Sess. 59-60 (1970), H.R. Rep. No. 91-1456, 2d Sess. 37-38 (1970), 84 Stat. 902 (1970).

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1410

TENNESSEE VALLEY AUTHORITY, - - *Plaintiff-Appellee,*

v.

36 ACRES OF LAND, MORE OR LESS, IN LYON COUNTY, KENTUCKY, JAMES B. ROWLAND, ALFREDA ROWLAND, His Wife, - *Defendants-Appellants.*

Before: PHILLIPS, Chief Judge, WEICK, Circuit Judge and ROTH, District Judge.

JUDGMENT—Filed Feb. 23, 1972

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court
/s/ James A. Higgins, Clerk

Issued as Mandate: March 15, 1972

COSTS: NONE
Filing fee . . . . . $———
Printing . . . . . $———

Total $———

A True Copy.
Attest:
/s/ James A. Higgins, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1419

TENNESSE VALLEY AUTHORITY, - *Plaintiff-Appellee,*

v.

TWO TRACTS OF LAND CONTAINING 53 ACRES AND 77 ACRES IN TRIGG COUNTY, KENTUCKY, JOHN W. EGERTON AND ANN B. EGERTON, His Wife, - - *Defendants-Appellants.*

BEFORES PHILLIPS, Chief Judge, WEICK, Circuit Judge and ROTH, District Judge.

JUDGMENT—Filed Feb. 23, 1972

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
/s/ James A. Higgins, Clerk

Issued as Mandate: March 15, 1972

COSTS: NONE

Filing fee . . . . . $———
Printing . . . . . $———

Total . . . . . $———

A True Copy.
Attest:
/s/ James A. Higgins, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1462

TENNESSEE VALLEY AUTHORITY, - *Plaintiff-Appellee,*

v.

A TRACT OF LAND CONTAINING 10.1 ACRES, MORE OR LESS IN TRIGG COUNTY, KENTUCKY, MARY B. DAVIS, ET AL., - *Defendants-Appellants.*

Before: PHILLIPS, Chief Judge, WEICK, Circuit Judge and ROTH, District Judge.

JUDGMENT—Filed Feb. 23, 1972

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ James A. Higgins, Clerk

Issued as Mandate: March 15, 1972

COSTS: NONE
Filing fee . . . . . $———
Printing . . . . . $———

Total . . . . . $———

A True Copy.
Attest:
/s/ James A. Higgins, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE VALLEY AUTHORITY, - *Plantiff-Appellee,*

v.

FOUR TRACTS OF LAND CONTAINING RESPECTIVELY 63.0 ACRES, MORE OR LESS: 8.8 ACRES, MORE OR LESS; 7.5 ACRES, MORE OR LESS AND 10.0 ACRES MORE OR LESS, ALL IN LYON COUNTY, KENTUCKY, HOMER RAY, ET AL., - - - *Defendants-Appellants.*

Before: PHILLIPS, Chief Judge, WEICK, Circuit Judge and ROTH, District Judge.

JUDGMENT—Filed Feb. 23, 1972

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
/s/ James A. Higgins, Clerk

Issued as Mandate: March 15, 1972

COSTS: NONE
Filing fee . . . . . $———
Printing . . . . . $———

Total . . . . . $———

A True Copy.
Attest:
/s/ James A. Higgins, Clerk

OPINION OF OCTOBER 17, 1968, RE DAVIS CASE

MEMORANDUM

This is a proceeding by the plaintiff, United States of America, upon the relation and for the use of the Tennessee Valley Authority to condemn certain interests in the land of the defendants, Mary B. Davis and L. A. Davis, her husband, for the development of the 170,000 acre Land Between the Lakes Recreation Demonstration. The defendants object to the taking of their property and have filed a motion to dismiss alleging there is no legal authority, reason or necessity for the condemnation of their lands; that the plaintiff is acting arbitrarily, capriciously and in bad faith; that the land is in excess of the requirements of the plaintiff; that the intended use of the land is extravagant and abusive and that the purposes, appropriation and use of the land is violative of the Constitution and laws of the United States. By an additional pleading, the defendants

further allege that the declaration of taking is insufficient, defective and contrary to law in that it is not signed by the proper authority; that it fails to disclose the availability or source of funds from which the value of the land will be paid or the limits on the price to be paid; fails to state title is vested in the United States; that all proper persons have not been made parties to this proceeding, all of which is allegedly contrary to Title 40 United States Code Section 258a.

There is no merit to any of these multifarious objections advanced by the defendants.

The authority under which the land is taken is the Tennessee Valley Authority Act of 1933 as amended, and the public use for which it is taken is the development, construction, operation and maintenance of the Land Between the Lakes Recreation Demonstration project. The Act authorizes the Tennessee Valley Authority to condemn all property that it deems necessary for carrying out the purposes of the Act. Title 16 United States Code Sections 831c(h), 831c(i), 831x. The authority to carry out the Land Between the Lakes project is Title 16 United States Code Section 831u; Executive Order No. 6161 dated June 8, 1933 and Presidential Press Release dated June 14, 1963.

The contention of the defendants that Sec. 22 of the Act merely authorizes the formulation of plans and separate legislation is required to implement them is refuted by the wording of the section which provides the President is not only authorized to make surveys and general plans but also to "make such studies, experiments, or demonstrations as may be necessary and suitable to that end." The Land Between the Lakes is a demonstration and, as stated above, it has been authorized by the President and by Congress.

Defendants' argument that plaintiff's acquisition of their land is unnecessary is answered by an uninterrupted

line of authorities holding that the necessity and extent of taking property by condemnation for public use is a matter to be determined by the legislature and not by the judiciary. Adirondack Ry. Co. v. New York State, 176 U. S. 335 (1900); Sears v. City of Akron, 246 U. S. 242 (1918); Bragg v. Weaver, 251 U. S. 57 (1919); Rindge Co. v. Los Angeles, 262 U. S. 700 (1923); Joslin Co. v. Providence, 262 U. S. 668 (1923); United States ex rel TVA v. Welch, 327 U. S. 546 (1946); United States v. Carmack, 329 U. S. 230 (1946); Berman v. Parker, 348 U. S. 26 (1954); United States v. Certain Real Estate, 217 F. 2d 920 (6th Cir. 1954); United States ex rel TVA v. An Easement, 246 F. Supp. 263 (W.D.Ky. 1965), affd. 375 F. 2d 120 (6th Cir. 1967). And the fact that the taking of lands for public use is a matter of legislative discretion and determination also answers defendants' conclusory allegations that plaintiff is acting arbitrarily, capriciously and in bad faith as well as being a complete answer to the allegations that defendants' land is in excess of plaintiff's requirements and is extravagant and abusive. And see Billings Utility Co. v. Advisory Comm., 135 F. 2d 108 (8th Cir. 1943); United States v. Bowman, 367 F. 2d 768 (7th Cir. 1966).

The taking of this land for the Land Between the Lakes demonstration is not contrary to the Constitution and laws of the United States. The statutory laws of the United States as set forth above authorizes the taking, and the project for which the land is taken is to demonstrate how the proper use, conservation and development of natural resources can stimulate the physical, economical and social development of the area. Such a project is authorized under the commerce clause and the general welfare clause of the Constitution. Ashwander v. TVA, 297 U. S. 288 (1936); Tennessee Elec. Power Co. v. TVA, 21 F. Supp. 947 (E. D. Tenn. 1938), affd. 306 U. S. 118 (1939); United States ex rel TVA v. Welch, 327 U. S. 546 (1946).

The objections of the defendants that the declaration of taking filed in this case is "insufficient, defective and contrary to law" does not warrant discussion. A comparison of the declaration of taking with Title 40 United States Code Section 258a establishes that the requirements of the statute have been met.

A proper order is this day entered denying the motions of the defendants.

Henry L. Brooks
United States District Judge

October 17, 1968

A Copy: Attest
August Winkenhofer, Jr., Clerk
By R. Gorman, Deputy Clerk

Copies to:

Robert H. Marquis, Esquire
Tennessee Valley Authority
Knoxville, Tennessee

Thomas A. Pedersen, Esquire
Assistant General Counsel

John C. Lovett, Esquire
William W. Hurst, Esquire
J. Granville Clark, Esquire
Clark Building
Russellville, Kentucky

JUDGMENT
(Filed April 12, 1971)

This cause came on to be heard, and it appearing to the Court that the parties have waived any hearing for the purpose of determining the compensation to be paid, and that the plaintiff has agreed to pay and the defendants have agreed to accept Ninety-five Thousand Four Hundred

Fifty Dollars ($95,450.00) as full compensation for the taking of the property herein condemned in the event plaintiff has a right to condemn said property; that defendants by approving this judgment certify that all taxes which constituted a lien on the property at the time of taking have been paid and the lien discharged; and that the plantiff has deposited in the registry of this Court in this cause Ninety-five Thousand Four Hundred Fifty Dollars ($95,450.00);

It is Ordered and Adjudged that:

1. The Court's order of February 4, 1969, denying defendants' motions to dismiss this proceeding is hereby confirmed. *All defenses raised in defendants' answer with respect to plaintiff's right to condemn the subject property are hereby stricken as being insufficient, immaterial, and impertinent.* To all of which the defendants object and except.

2. The vesting of the fee simple title in the United States of America, free of all liens, claims and encumbrances, except as hereinafter shown, as evidenced by the declaration of taking filed December 20, 1968, is hereby fully and finally confirmed as to the following described property:

(TRACT NOS. 9KS:LBL-13
and 9KN:LBL-2)

An estate in fee simple in the following described TRACT NO. 9KS:LBL-13:

A tract of land lying in the First Magisterial District of Trigg County, State of Kentucky, on the left side of Prior Creek, approximately 3 miles north of Model, and more particularly described as follows:

Beginning at a monument in a fence line, a corner of the lands of the United States of America (Department of the Army) and the Effie Hendricks Heirs; thence with the Effie Hendricks Heirs' line and with the fence line for

the first approximate 1700 feet S. 58° W., 1840 feet, crossing a county road at approximately 1730 feet, to a stone, a corner of the lands of the Effie Hendricks Heirs and W. A. Futrell; thence with W. A. Futrell's line N. 38° W., 405 feet to a point; thence N. 35° E., 20 feet to a point in the center line of the previously mentioned county road; thence with the center line of the county road in a northwesternly direction approximately 235 feet to a point, a corner of the lands of W. A. Futrell and the United States of America (Department of the Army); thence leaving the road and with the United States of America's boundary by bearings and distances as follows: N. 63° 17′ E., 109 feet; N. 31° 11′ E., 164 feet; N. 89° 22′ E., 43 feet; N. 30° 55′ E., 770 feet; N. 42° 53′ E., 189 feet; N. 46° 42′ E., 174 feet; N. 88° 19′ E., 147 feet; S. 50° 30′ E., 228 feet; N. 8° 15′ E., 214 feet; N. 36° 05′ W., 239 feet; N. 6° 31′ E., 140 feet; N. 23° 58′ E., 208 feet; N. 40° 04′ E., 201 feet; N. 58° 53′ E., 309 feet; N. 69° 30′ E., 167 feet; S. 88° 09′ E., 109 feet; S. 42° 47′ E., 121 feet; S. 22° 02′ E., 83 feet; S. 11° 24′ W., 50 feet to a monument; S. 17° 12′ E., 217 feet to a monument; S. 20° 23′ W., 33 feet to a monument; S. 73° 17′ W., 330 feet to a monument; S. 8° 18′ E., 848 feet to a monument; S. 32° 55′ E., 272 feet to the point of the beginning, and containing 53. acres, more or less.

The above-described land is acquired except insofar as the United States of America already owns certain rights therein, consisting of a permanent flowage easement over portions thereof, by virtue of a deed recorded in Deed Book 67, page 525, in the office of the Register of Trigg County Kentucky.

The above described land is acquired subject to such rights as may be vested in the county to a right of way for a road.

The directions of lines are referred to the Kentucky (South) Coordinate System.

TRACT NO. 9KN:LBL-2:

A tract of land lying in the First Magisterial District of Trigg County, State of Kentucky, on the left side of Prior Creek, approximately 3½ miles north of Model, and more particularly described as follows:

Beginning at a 14-inch red oak tree at a fence corner, a corner of the lands of Homer B. Futrell et ux and Herlie Lendal Chadwick; thence with Herlie Lendal Chadwick's line and with a fence line N. 86° 30′ E., 2060 feet to a 12-inch black gum tree at a fence angle; thence N. 67° E., 230 feet to a monument, a corner of the lands of Herlie Lendal Chadwick and the United States of America (Department of the Army); thence with the United States of America's line, leaving the fence line, by bearings and distances as follows: S. 27° 23′ W., 73 feet; N. 73° 14′ E., 122 feet; N. 59° 20′ E., 160 feet; S. 70° 23′ E., 77 feet; N. 13° 48′ E., 110 feet; N. 71° 43′ E., 192 feet; S. 79° 06′ E., 132 feet; S. 89° 52′ E., 254 feet; S. 72° 24′ E., 97 feet; S. 44° 15′ E., 73 feet; S. 2° 19′ W., 87 feet; S. 30° 13′ E., 164 feet; S. 8° 58′ W., 99 feet; S. 43° 18′ W., 178 feet; S. 55° 08′ W., 279 feet; S. 70° 30′ W., 211 feet; S. 56° 07′ W., 241 feet; S. 79° 32′ W., 138; N. 81° 23′ W., 122 feet; S. 42° 24′ W., 181 feet; S. 59° 52′ W., 108 feet; N. 89° 46′ W., 232 feet; S. 55° 46′ W., 221 feet; S. 79° 44′ W., 91 feet; S. 69° 26′ W., 240 feet; S. 54° 25′ W., 118 feet; S. 54° 48′ W., 198 feet; S. 38° 32′ W., 205 feet; S. 64° 53′ W., 61 feet; N. 66° 33′ W., 206 feet; S. 55° 03′ W., 215 feet to a point; thence N. 89° 51′ W., 323 feet to a point at a road; thence S. 89° 46′ W., 195 feet to a point in the center line of a county road, a corner of the lands of the United States of America (Department of the Army) and Homer B. Futrell et ux; thence with Homer B. Futrell et ux's line and with the center line of the county road in a westerly direction approximately 256 feet to a point thence, leaving the road, N. 20° E., 390 feet, passing a 12-inch cedar tree at 15 feet, to a stake; thence S. 70° E., 140

feet to a stake; thence N. 5° W., 1010 feet to the point of beginning and containing 77. acres, more or less.

The above-described land is acquired except insofar as the United States of America already owns certain rights therein, consisting of a permanent flowage easement over portions thereof, by virtue of deeds recorded in Deed Book 67, page 525, and Deed Book 68, page 35, in the office of the Register of Trigg County, Kentucky.

The above-described land is acquired subject to the following:

1. Such as may be vested in third parties to a right-of-way for an electric power distribution line.

3. Outstanding burial rights in the land known as Hanes Cemetery located in the westerly portion of the above-described land and identified by the following bearings and distances.

Beginning at an 18-inch red oak at a fence corner which marks the southwest corner of the cemetery tract, said point being N. 46° 30′ E., 324 feet from the stake at the south end of that course identified in the above metes and bounds description by a bearing and distance of N. 5° W., 1010 feet; thence with a fence line N. 17° W., 151 feet to a fence corner; N. 65° E., 152 feet to a fence corner; S. 12° E., 89.5 feet to a fence angle; S. 2° W., 89 feet to a fence corner; S. 67° W., 66 feet to a fence angle; S. 82° W., 43 feet to the point of beginning.

The directions of lines are referred to the Kentucky (South) Co-ordinate System except for those lines enclosing the Hanes Cemetery tract and the tie thereto which are based on Magnetic North.

3. The defendants shall recover of the plaintiff Ninety-five Thousand Four Hundred Fifty Dollars ($95,450.00) as full compensation for the taking of the said property.

4. The Clerk of this Court is authorized and directed to draw a check on the funds on deposit with the Court

in this case in the amount of Ninety-five Thousand Four Hundred Fifty Dollars ($95,450.00) payable to John W. Egerton and Ann B. Egerton and mail said check to them in care of their attorney, J. Granville Clark, Esq., Clark Building, Russellville, Kentucky 42276.

5. The Clerk of this Court shall furnish to the plaintiff a certified copy of this judgment which shall serve as a muniment of title.

Done this 9th day of April, 1971.

/s/ Rhodes Bratcher
Judge

Have seen:

/s/ Robert H. Marquis
Robert H. Marquis
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902
Attorney for Plaintiff

/s/ J. Granville Clark
J. Granville Clark
Clark Building
Russellville, Kentucky 42276
Attorney for Defendants

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1491

TWO TRACTS OF LAND, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

These are four condemnation actions brought by the TVA, pursuant to Sections 4(h), 4(i), and 25 of the TVA Act, 16 U.S.C. 831c(h), 831c(i), and 831x, to acquire land for the "Land Between the Lakes" project, which is a demonstration in conservation, reforestation, recreation and other resource development in a 170,000-acre area between Kentucky and Barkley Lakes in Kentucky and Tennessee.

In 1963 the President directed TVA to undertake the Land Between the Lakes project as a demonstration under Section 22 of the TVA Act, 16 U.S.C. 831u

470-392—72

(Pet. 4–5).[1] Congress appropriated funds for the project in 1963 and each year thereafter.[2]

Petitioners contend (1) that TVA is without statutory authority to take their property because the project is not a demonstration within the meaning of Section 22, and (2) that TVA acted arbitrarily, capriciously, and in bad faith in that it was, in fact, taking property to resell at a profit.

1. The Land Between the Lakes project is a demonstration project of the kind the President is specifically authorized to undertake by Section 22. Accordingly, the condemnations were lawful.

During Senate debate on the appropriation for fiscal year 1964, Senator Hill of Alabama, speaking for the majority members of the Senate Appropriations Committee whose recommendation for an appropriation for the project was thereafter adopted, stated:

> Development of the Land Between the Lakes is precisely the type of demonstration contemplated by section 22 of the Tennessee Valley Authority Act. * * *
>
> * * * * *
>
> * * * There will be hunting and fishing and water sports. There will be primitive camping areas and areas for families and for groups. The whole development will provide an outdoor classroom in conservation. * * * There is no development like this anywhere in the United

[1] See Presidential Press Release of June 14, 1963 (Pet. App. 22–23).

[2] A reference to congressional action funding the project from 1963 through 1971 is attached as an appendix to the opinion of the court of appeals (Pet. App. 28). For fiscal year 1972, see H. Rep. No. 92–381, 92d Cong., 1st Sess., 80; S. Rep. No. 92–327 at 58; H. Conf. Rep. No. 92–479 at 32; 85 Stat. 365.

> States. This multipurpose park will provide the information which Congress and the States will need. It will demonstrate the kind of recreation areas needed in the future to serve our urbanized and industrialized society [110 Cong. Rec. 18518–18519].

Moreover, the scope of the project, involving 170,000 acres, was specified by the President (see note 1, *supra*), and its precise boundaries were shown on a map used during the appropriations hearings (Pet. App. 27 n. 2). Congress has had all this information before it and has continued to make appropriations for the project, notwithstanding objections to the project during the appropriations hearings similar to those made by petitioners.[3]

Thus, by its continued annual appropriations of funds for this project since 1963, Congress has expressed agreement with the President's and TVA's construction of Section 22 as authorizing the type of demonstration being conducted in Land Between the Lakes. This history of informed and deliberate congressional action "constitutes ratification of administrative construction, and confirmation and approval of the [agency's action]." *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 293–294. See, also, *Brooks* v. *Dewar,* 313 U.S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U.S. 111, 116.

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[3] *Hearings on H.R. 11579 before the Subcommittee of the Senate Committee on Appropriations, Atomic Energy Commission, Tennessee Valley Authority* 88th Cong., 2d Sess.; *Hearings before Subcommittee of the House Committee on Appropriations,* 88th Cong., 2d Sess., pt. 3; *Hearings on H.R. 9220 before the Subcommittee of the Senate Committee on Appropriations,* 89th Cong., 1st Sess., pt. 4.

2. Petitioners' second contention—that TVA acted arbitrarily, capriciously, and in bad faith by taking land "in excess of the land necessary" for this demonstration project in order "ultimately" to resell it at a profit—was correctly held to be without factual basis and does not merit further review. The complaint and declaration of taking in each of these actions state that the

> * * * public use for which the property is taken is the development, construction, operation, and maintenance of the Land Between the Lakes Recreation Demonstration.

It is undisputed that these properties are within the 170,000 acres whose acquisition and use for the project the President expressly directed. Accordingly, the courts below correctly held that TVA did not act in bad faith in acquiring the property. As this Court stated in *Berman* v. *Parker*, 348 U.S. 26, 35–36:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose had been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker* v. *United States*, 147 U.S. 282, 298; *United States ex rel. T.V.A.* v. *Welch*, *supra*, 554; *United States* v. *Carmack*, 329 U.S. 230, 247.

Finally, the court of appeals properly took judicial notice (Pet. App. 26–27) that the question of TVA's alleged intention to resell property was raised during the congressional hearings and expressly denied by TVA Board Chairman Wagner, and that Congress

thereafter continued to appropriate funds for the project.[4]

Petitioners apparently are dissatisfied with the type of demonstration TVA is conducting or believe that a demonstration should not be conducted at all. But such policy complaints should be addressed to Congress and not to the courts. Cf. *United States* v. *2,606.84 Acres of Land in Tarrant County, Tex.*, 432 F. 2d 1286 (C.A. 5), certiorari denied. 402 U.S. 916.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1972.

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[4] The court of appeals' reference was to a statement by Mr. Wagner during the 1964 Senate appropriations hearings which was, in part, as follows:

"Mr. WAGNER. Now the last point you mentioned, Senator, was that some people said that TVA intended to buy 8,000 acres of this land and then resell it for commercial purposes. Such a statement is just a plain lie, Senator Cooper, and let me say it irritates me very much. We have made it clear from the beginning that we thought that for this area, to fulfill the purpose which we believe it can serve to the benefit of the people of this Nation, it must be completely in public ownership and used for recreation within the boundaries that we have described.

"We have never had any idea that we would resell any of that land for private use * * *" (*Hearings on H.R. 11579 before a Subcommittee of the Senate Committee on Appropriations, Atomic Energy Commission, Tennessee Valley Authority*, 88th Cong., 2d Sess., 30).

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